STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 27, 2006
v	No. 259899 Genesee Circuit Court
JAMES EDWARD CARRODINE, Defendant-Appellant.	LC No. 04-014432-FC

Before: Whitbeck, C.J., and Zahra and Donofrio, JJ.

PER CURIAM.

Defendant James Carrodine appeals as of right his jury trial convictions of assault with intent to commit murder,[1] possession of a firearm during the commission of a felony (felony-firearm),[2] and carrying a concealed weapon (CCW).[3] The trial court sentenced Carrodine to 20 to 40 years' imprisonment for the assault with intent to murder conviction, two years' imprisonment for the felony-firearm conviction, and two and one-half to five years' imprisonment for the CCW conviction. We affirm Carrodine's convictions and sentences as modified and remand for correction of the judgment of sentence.

I. Basic Facts And Procedural History

Carrodine's convictions stem from the shooting of 33-year-old Johnny Davis at approximately 3:00 a.m. on June 17, 2004, on Prospect Street in the city of Flint. Davis testified that, at approximately 12:00 or 1:00 a.m., he had been drinking beer with a man named "Snoop" on the porch of Snoop's house on Prospect. Another man, whom Davis knew as "Mr. Block," was sitting in his van in a driveway listening to his radio. Davis testified that, at some point after Snoop went into the house, Mr. Block exited his van. Davis claims that he approached Mr. Block and that, essentially without provocation, Mr. Block shot Davis with a handgun three times.

[1] MCL 750.83.

[2] MCL 750.227b.

[3] MCL 750.227.

Davis testified that he knew that Mr. Block had a "problem" with Snoop and another man, James Marcus White, or "Marcus." Davis wanted to speak with Mr. Block alone because Davis was "hoping [Mr. Block] didn't feel like [Davis] was part of this problem." Davis walked over to Mr. Block and asked him "what time it was." "[T]he next thing [Davis] kn[e]w [Mr. Block] shot [him] in the neck." Davis thought that Mr. Block shot him two more times. The bullet that entered his neck pierced his lung, causing complete collapse of the lung, and lodged near his heart. His small and large intestines were also damaged from a gunshot wound or wounds to his stomach. Davis denied knowing anyone named "James Carrodine," but in court he identified Carrodine as the person he knew as "Mr. Block." Defense counsel argued that Carrodine acted in self-defense because he reasonably believed that Davis was about to attack him with a machete.

II. Effective Assistance of Counsel

A. Standard Of Review

Carrodine argues that he was denied the effective assistance of counsel at trial because defense counsel failed to object to portions of the testimony of Sergeant Jennifer Besson. Sergeant Besson participated in a videotaped interview of Carrodine that occurred after his arrest. The video was offered as a confession to the shooting but, because of its poor quality, long portions of it were apparently indecipherable. Accordingly, defense counsel, who had viewed the video twice in the presence of both Sergeant Besson and the prosecutor, agreed to allow Sergeant Besson to testify from her memory and notes regarding the content of the portions of the video that were difficult to understand. Carrodine argues that Sergeant Besson's testimony consisted of a grossly misstated, editorialized version of his statement to police and, therefore, that her testimony was largely inadmissible and highly prejudicial.

Effective assistance of counsel is presumed, and a defendant bears a heavy burden to prove otherwise.[4] To support a claim of ineffective assistance, a defendant must show: (1) the representation fell below an objective standard of reasonableness under prevailing professional norms; (2) there is a reasonable probability that, but for the attorney's error, the result of the proceedings would have been different; and (3) the resulting proceedings were therefore fundamentally unfair or unreliable.[5] In evaluating a claim of ineffective assistance, "[t]his Court will not substitute its judgment for that of trial counsel regarding matters of trial strategy, even if that strategy backfired."[6] However, "[a] defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses"; "[a] substantial defense is one that might have made a difference in the outcome of the trial."[7] Here, because Carrodine did not create a

[4] *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

[5] *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); *Rodgers*, *supra* at 714.

[6] *Rodgers*, *supra* at 715.

[7] *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

supplementary record at a *Ginther*[8] hearing or in connection with a motion for a new trial, our review is limited to facts apparent in the lower court record.[9] Whether the facts in the record suggest that defendant has been deprived of his right to the effective assistance of counsel presents a question of constitutional law that we review de novo.[10]

B. *People v McGillen #1*

Carrodine primarily argues that large portions of Sergeant Besson's testimony were inadmissible, citing *People v McGillen #1*.[11] However, Carrodine misapplies the *McGillen* Court's general statement that "[i]t is only the Defendant's statements that may be admissible against him, not the arresting officer's editorialized version of them."[12] In *McGillen*, a testifying police officer purported to restate an incriminating answer given by the defendant during an interview with the officer; the officer characterized the statement as a definite, direct answer to a direct question.[13] The officer later admitted that the defendant's actual answer was unresponsive and in need of explanation.[14] The Court concluded that the officer's testimony may have been "nothing more" than a "repeated paraphrase of the entire conversation."[15] Significantly, the Court found that the paraphrased statements were inadmissible both because of the officer's lack of candor with the Court and because of his deliberate attempt to bypass the defendant's *Miranda*[16] rights.[17]

This Court later recognized the limits of *McGillen* in *People v Stander*[18] and *People v Eccles*.[19] Both cases noted that the *McGillen* holding rested, at least in part, on the Court's conclusion that there had been *Miranda* violations.[20] The *Eccles* Court also opined that the officer's deliberate testimony to an edited version of the defendant's statements went only to the question of the officer's credibility.[21] Most significantly, the *Eccles* Court explicitly rejected the defendant's argument that paraphrased accounts of a statement are inadmissible because they are

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[8] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

[9] *People v Sabin* (*On Second Remand*), 242 Mich App 656, 659; 620 NW2d 19 (2000).

[10] *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

[11] *People v McGillen #1*, 392 Mich 251; 220 NW2d 677 (1974).

[12] *Id*. at 263.

[13] *Id*.

[14] *Id*.

[15] *Id*.

[16] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[17] *Id*. at 263-264.

[18] *People v Stander*, 73 Mich App 617; 251 NW2d 258 (1976).

[19] *People v Eccles*, 141 Mich App 523; 367 NW2d 355 (1984).

[20] *Eccles*, *supra* at 525; *Stander*, *supra* at 627.

[21] *Eccles*, *supra* at 525.

necessarily different from a defendant's exact statement.[22] Such a rule, this Court explained, would overlook "the safeguards already present in our justice system to filter out inaccurate or exaggerated testimony such as cross-examination and impeachment."[23]

C. Carrodine's Challenges To Sergeant Besson's Testimony

Crucially, Carrodine does not explicitly challenge Sergeant Besson's testimony regarding what he actually said during his statement. He also does not specifically argue that the video did not contain what essentially appeared to be a confession to the shooting. Rather, he contends that Sergeant Besson should have confined her testimony to his actual statements, and he concedes that if she had her testimony would not have been objectionable. Carrodine also concedes that the central issue in the case remains whether he specifically intended to kill Davis or, instead, was acting in self-defense.

We group Carrodine's challenges to Sergeant Besson's testimony into two categories. First, he contests instances when Sergeant Besson was permitted to interpret Carrodine's actual statements after unclear portions of the video had been played for the jury and in which she appears to have difficulty accurately recounting the contents of the video. For instance, Carrodine cites portions of the following testimony, when the prosecutor was questioning Sergeant Besson:

> *A.* [Carrodine] also stated, he said I told you so, and he used the N word there.
>
> * * *
>
> [DEFENSE COUNSEL]: You mentioned a moment ago, he says I told you so. Wasn't that Snoop saying I told you so, N-----? . . . Snoop is saying I told you so there.
>
> *A.* I remember, at the beginning of that, he did say yes, afterwards Snoop said I told you so, so if he was repeating that, then that would be Snoop that said that.
>
> * * *
>
> *A.* I didn't catch that. I'm sorry. It's hard to write the notes and- -
>
> [The video is played.]
>
> *Q.* I can't hear it from here. I'm sorry. Did he say kids?
>
> *A.* I heard something about kids, but- -

[22] *Id*. at 524.

[23] *Id*. at 524-525; see also *Stander*, *supra* at 627 (distinguishing its facts in part because there was no "deliberate attempt to inflate or invent testimony").

[DEFENSE COUNSEL]: He didn't know what to do, except for his baby and his kids.

[The video is played.]

Q. What did he say about a next of? What was that all about?

A. I'm sorry. I'm not catching every line here. I know if I asked you to turn it up, it's just going to make the static worse. He's talking here a little about his kids, and his kids are with him, and he doesn't want to mess up because of the kids.

This testimony does not constitute a deliberate attempt to mischaracterize Carrodine's statements. Moreover, the jury was able to directly observe the contents of the video and compare the contents to Sergeant Besson's interpretation. Defense counsel also appears to have appropriately questioned and corrected Sergeant Besson when he detected inaccuracies. Accordingly, we cannot agree with Carrodine's characterization of Sergeant Besson's statements as inadmissible "false testimony." Rather, her testimony and attempts to remember the interview presented defense counsel with material for cross-examination and clarification.

Second, Carrodine challenges instances in which Sergeant Besson appears to comment on his guilt by testifying about her assumptions that he committed the shooting or about his state of mind during the interview. Sergeant Besson admitted that she based her interviewing strategy on the assumption that Carrodine was the shooter. At trial, the prosecutor asked several times during the playing of the video whether Carrodine had admitted to performing the shooting "yet." Sergeant Besson responded by saying, "no," by saying that Carrodine responded "like this was new information for him," and by explaining that "he doesn't want to admit that he shot him," and that "he still doesn't offer a reason for why this happened." Sergeant Besson also characterized Carrodine's initial responses as "[b]asically a denial," and, at one point early in the interview, for instance, she explained: "he's just not really got an answer for tonight. He's just making the motion with his hand."

Again, such testimony is not a mischaracterization of Carrodine's actual statements. Rather, it was clear from the context of the testimony that Sergeant Besson was adding her own assumptions about Carrodine not "wanting" to admit to the shooting. Sergeant Besson admitted that, during such interviews, "[w]e like to make it seem as though we already know everything that happened, so what they're telling us won't seem new to us." She explained that she and the other interviewing officer intentionally "minimiz[ed] what's happened and offer[ed Carrodine] an out" to gain a confession. Contrary to Carrodine's argument on appeal, this again is not "false testimony" requiring reversal.

Sergeant Besson's testimony may have presented technical grounds for objection by defense counsel. For instance, counsel was not precluded from arguing that Sergeant Besson's uncertain interpretations of the unclear portions of the video were confusing or misleading.[24] In

[24] MRE 403.

addition, counsel may have argued that Sergeant Besson did not have personal knowledge of the shooting or of Carrodine's state of mind and, therefore, of whether he could be said not to "want" to confess.[25] However, in light of the context of her testimony, we cannot conclude that counsel's decision not to object on these grounds constituted ineffective assistance. Rather, Sergeant Besson's testimony appeared to aid counsel's trial strategy.

As Carrodine concedes, his primary defense to the assault with intent to murder charge was that he acted in self-defense. In support of this defense, Carrodine relied on the videotaped statement as evidence to argue that he was reasonably defending himself from Davis. Davis allegedly approached Carrodine in the dark when he was alone, and he either saw that Davis had a machete or reasonably assumed that Davis had a machete because he had seen Davis carrying one earlier that day.

Accordingly, defense counsel did not object to the introduction of the video but instead attempted to minimize its negative impact. For instance, counsel noted that, "of course," a person will initially "minimize" his acts in such a situation. In both his opening and closing statements, he also explicitly referred to the high-pressure tactics that the officers admittedly used to coax Carrodine to confess. He opined that "they'll say what they have to" to "get [Carrodine] to say the right things so that they can close the case." Defense counsel appeared to attempt to dilute the impact of some aspects of the video by explaining these tactics and by telling the jury that he would have introduced the video to illustrate these tactics even if the prosecutor had not introduced it. Particularly in the face of this defense strategy, Carrodine's arguments on appeal do not convince us that counsel's decision not to object to Sergeant Besson's testimony was objectively unreasonable or deprived Carrodine of a substantial defense. Rather, counsel appeared to allow Sergeant Besson's testimony to highlight the circumstances of the interview. Moreover, given that Carrodine does not contest that he was the shooter, Sergeant Besson's assumptions about his culpability for the shooting, particularly alongside her testimony that she tried to elicit a statement about why he did it, does not appear to run appreciably afoul of Carrodine's argument that he acted in self-defense. For these reasons, we conclude that the record does not support Carrodine's claim of ineffective assistance.

D. Concession Of Guilt

Carrodine also argues that he was denied the effective assistance of counsel because his defense counsel conceded that Carrodine was guilty of CCW. In his closing statement, defense counsel noted that Carrodine admitted, during his videotaped statement, that he was carrying a gun and, therefore, that he was clearly guilty of the CCW charge. Carrodine argues that these comments constituted a complete concession of guilt that requires reversal of the CCW charge.

As a general rule, absent the defendant's consent, "a complete concession of defendant's guilt . . . constitutes ineffective assistance of counsel."[26] However, "[a]n attorney may well admit guilt of a lesser included offense in hopes that due to his candor the jury will convict of the

[25] MRE 602.

[26] *People v Krysztopaniec*, 170 Mich App 588, 596; 429 NW2d 828 (1988).

lesser offense instead of the greater."[27] Accordingly, we distinguish this case from those that Carrodine cites because those cases generally involve an attorney's admission of guilt to the sole or highest crime charged.[28]

Here, as Carrodine concedes on appeal, "[t]he central issue in this case was whether [he] specifically intended to kill Davis or was acting in self-defense." Accordingly, counsel argued that Carrodine acted in self-defense and was not guilty of assault with intent to murder or of any of the lesser assault charges. He stressed the prosecutor's burden to prove guilt beyond a reasonable doubt and contrasted the evidence that Carrodine had a gun with the lack of direct evidence, for instance, that he had any intent to kill. Counsel stated, for instance: "if you find him guilty of anything, it would have to [be] beyond a reasonable doubt, just like the CCW. It has to be beyond a reasonable doubt, not just maybe." Such an argument is not objectively unreasonable in light of the facts that Carrodine admitted that the shooter was carrying a gun and his theory of self-defense implicitly conceded that he was carrying a gun.

III. Sentencing

A. Standard Of Review

Carrodine argues that the judgment of sentence must be modified because the trial court improperly concluded that his sentence for CCW should be served consecutive to his sentence for felony-firearm. Over Carrodine's objection, the trial court sentenced him to serve his two and one-half to five year CCW sentence and his 20 to 45 year assault with intent to murder sentence concurrent to each other but consecutive to his two-year felony-firearm sentence. A trial court may impose consecutive sentences only when specifically authorized by statute.[29] Accordingly, the imposition of consecutive sentences is a question of statutory interpretation that we review de novo.[30]

B. The Statute

The felony-firearm statute states that a sentence for felony-firearm "shall be served consecutively with and preceding any term of imprisonment imposed for the conviction of the felony or attempt to commit the felony."[31] The Michigan Supreme Court has established that this language evinces the Legislature's intent that a sentence for felony-firearm be consecutive

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[27] *People v Shultz*, 85 Mich App 527, 532; 271 NW2d 305 (1978); see also *People v Emerson* (*After Remand*), 203 Mich App 345, 349; 512 NW2d 3 (1994) (declining to "second-guess counsel's trial tactic of admitting guilt of a lesser offense").

[28] See, e.g., *People v Fischer*, 119 Mich App 445, 448-449; 326 NW2d 537 (1982); *Shultz*, *supra* at 532; *Wiley v Sowers*, 647 F2d 642, 650-651 (CA 6, 1981).

[29] *People v Gonzalez*, 256 Mich App 212, 229; 663 NW2d 499 (2003).

[30] *Id*.

[31] MCL 750.227b(2).

only to the sentence for a specific underlying felony.[32] Here, the underlying felony is assault with intent to kill; CCW may not constitute an underlying felony for purposes of a felony-firearm conviction.[33] Therefore, although the assault with intent to kill sentence must run consecutive to the felony-firearm sentence, the CCW sentence may not.[34] The judgment of sentence should be corrected to reflect initial concurrent sentences for the felony-arm and CCW convictions, with the assault with intent to kill sentence running consecutive to the felony-firearm sentence. Carrodine's credit for 154 days' jail time should be adjusted to apply to both the initial concurrent sentences.[35]

Affirmed as modified by this opinion and remanded for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Brian K. Zahra
/s/ Pat M. Donofrio

[32] *People v Clark*, 463 Mich 459, 463; 619 NW2d 538 (2000).

[33] MCL 750.227(b)(1); *People v Cortez*, 206 Mich App 204, 207; 520 NW2d 693 (1994).

[34] *Cortez*, *supra* at 207.

[35] MCR 7.216(A)(1) and (A)(7); *Clark*, *supra* at 465, 465 n 14; *Cortez*, *supra* at 207.